

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

BARRY W. MILLS,

Cause No. CV 12-146-BLG-RFC-CSO

Petitioner,

vs.

FINDINGS AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

FERGUS COUNTY SHERIFF'S
DEPARTMENT,

Respondent.

On November 15, 2012, Petitioner Barry Mills, a state prisoner proceeding pro se, submitted a petition for writ of habeas corpus under 28 U.S.C. § 2254. On the same day, the Clerk of Court sent Mills a letter explaining that he must either pay the \$5.00 filing fee or move to proceed in forma pauperis. The Clerk included a form motion to proceed in forma pauperis with the letter. Mills did not respond.

This action should be dismissed for failure to pay the filing fee or file a motion to proceed in forma pauperis. A certificate of appealability is not warranted, because 28 U.S.C. § 1914 plainly requires a filing fee of \$5.00 and Mills has not moved to

proceed under 28 U.S.C. § 1915.

Based on the foregoing, the Court enters the following:

RECOMMENDATION

1. The Petition (doc. 1) should be DISMISSED.
2. The Clerk of Court should be directed to enter by separate document a judgment of dismissal.
3. A certificate of appealability should be DENIED.

**NOTICE OF RIGHT TO OBJECT TO FINDINGS & RECOMMENDATION
AND CONSEQUENCES OF FAILURE TO OBJECT**

Pursuant to 28 U.S.C. § 636(b)(1), Mills may serve and file written objections to this Findings and Recommendation within fourteen (14) days of the date entered as indicated on the Notice of Electronic Filing. If Mills files objections, he must itemize each factual finding to which objection is made and must identify the evidence in the record he relies on to contradict that finding; and he must itemize each recommendation to which objection is made and must set forth the authority he relies on to contradict that recommendation. Failure to assert a relevant fact or argument in objection to this Findings and Recommendation may preclude Mills from relying on that fact or argument at a later stage of the proceeding. A district judge will make a

de novo determination of those portions of the Findings and Recommendation to which objection is made. The district judge may accept, reject, or modify, in whole or in part, the Findings and Recommendation. Failure to timely file written objections may bar a de novo determination by the district judge and/or waive the right to appeal.

DATED this 20th day of December, 2012.

/s/ *Carolyn S. Ostdby*
United States Magistrate Judge